Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

MANFRED DeREWAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the District Court have the jurisdiction to violate a sentence of probation consecutive to a sentence on which Petitioner is serving parole where the probation is not due to commence until fourteen years in the future?

2. Did the refusal of the lower courts to apply the provisions of Federal Rule of Criminal Procedure 26.2 to Petitioner's request for production of the probation officer's file violate Petitioner's right to due process of law?

3. Did an administrative modification of a condition of probation imposed at the time of sentence constitute a violation of Petitioner's right to due process of law and assistance of counsel when the change was not implemented as provided by Federal Rule of Criminal Procedure 32.1(b)?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceedings in the court whose judgment is sought to be reviewed.

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OPINIONS BELOW

The Judgment of the United States Court of Appeals for the Third Circuit filed September 15, 1995 is Appendix C to this Petition. The Opinion of the Third Circuit (per Mansmann, J. with Hutchinson and Roth, JJ.) was filed on the same date. The Opinion has been reported at 66 F.3d 52 and is Appendix B to this Petition. The Third Circuit's Order of October 16, 1995 denying rehearing is appended as Appendix A. The Memorandum and Order of the District Court dated February 9, 1995, finding DeRewal in violation of probation is Appendix D. The Memorandum and Order of the District Court dated December 23, 1994 denying DeRewal's Petition to Dismiss the Probation Violation Petition for Lack of Jurisdiction is appended to this Petition as Appendix E.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit was entered on September 15, 1995. The Petition for Rehearing was denied on October 16, 1995. This Petition is filed within 90 days of October 16, 1995. This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with the Witnesses against him: to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

18 U.S.C. § 3500

Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such

delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means —

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand Jury.

18 U.S.C. § 3651 (Relevant Provisions)

Suspension of sentence and probation

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place

the defendant on probation for such period and upon such terms and conditions as the court deems best. . . .

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years. . . .

18 U.S.C. § 3653 (Relevant Provisions)

Report of probation officer and arrest of probationer

When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable. . . .

At any time within the probation period, the probation officer may for cause arrest the probationer wherever found, without a warrant. At any time within the probation period, or within the maximum probation period permitted by section 3651 of this title, the court for the district in which the probationer is being supervised or if he is no longer under supervision, the court for the

district in which he was last under supervision, may issue a warrant for his arrest for violation of probation occurring during the probation period. Such warrant may be executed in any district by the probation officer or the United States marshal of the district in which the warrant was issued or of any district in which the probationer is found. If the probationer shall be arrested in any district other than that in which he was last supervised, he shall be returned to the district in which the warrant was issued, unless jurisdiction over him is transferred as above provided to the district in which he is found, and in that case he shall be detained pending further proceedings in such district.

As speedily as possible after arrest the probationer shall be taken before the Court for the district having jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed.

Federal Rules of Criminal Procedure

Rule 26.2. Production of Witness Statements

(a) Motion for Production. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall

order the attorney for the government or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

(b) Production of Entire Statement. If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.

(c) Production of Excised Statement. If the other party claims that the statement contains privileged information or matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that are privileged or that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection must be preserved by the attorney for the government and, if the defendant appeals a conviction, must be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

(d) Recess for Examination of Statement. Upon delivery of the statement to the moving party, the court, upon application of that party, may recess the proceedings so that counsel may examine the statement and prepare to use it in the proceedings.

(e) Sanction for Failure to Produce Statement. If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney for the government who elects not to comply, shall declare a mistrial if required by the interest of justice.

(f) Definition. As used in this rule, a "statement" of a witness means:

(1) a written statement made by the witness that is signed or otherwise adopted or approved by the witness;

(2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or

(3) a statement, however taken or

recorded, or a transcription thereof, made by the witness to a grand jury.

(g) Scope of Rule. This rule applies at a suppression hearing conducted under Rule 12, at trial under this rule, and to the extent specified:

(1) in Rule 32(e) at sentencing;

(2) in Rule 32.1(c) at a hearing to revoke or modify probation or supervised release;

(3) in Rule 46(i) at a detention hearing; and

(4) in Rule 8 of the Rules Governing Proceeding under 28 U.S.C. § 2255.

Rule 32.1. Revocation or Modification of Probation orSupervised Release

(a) Revocation of Probation or Supervised Release.

(1) Preliminary Hearing. Whenever a person is held in custody on the ground that the person has violated a condition of probation or supervised release, the person shall be afforded a prompt hearing before any judge, or a United States magistrate who has been given the authority pursuant to 28 U.S.C. § 636 to conduct such hearings, in

order to determine whether there is probably cause to hold the person for a revocation hearing. The person shall be given

(A) notice of the preliminary hearing and its purpose and of the alleged violation;

(B) an opportunity to appear at the hearing and present evidence in the person's own behalf;

(C) upon request, the opportunity to question witnesses against the person unless, for good cause, the federal magistrate decides that justice does not require the appearance of the witness; and

(D) notice of the person's right to be represented by counsel.

The proceedings shall be recorded stenographically or by an electronic recording device. If probable cause is found to exist, the person shall be held for a revocation hearing. The person may be released pursuant to Rule 46(c) pending the revocation hearing. If probable cause is not found to exist, the proceeding shall be dismissed.

(2) **Revocation Hearing.** The revocation hearing, unless waived by the person, shall be held within a reasonable time in the district of jurisdiction. The person shall be given

(A) written notice of the alleged violation;

(B) disclosure of the evidence against the person;

(C) an opportunity to appear and to present evidence in the person's own behalf;

(D) the opportunity to question adverse witnesses; and

(E) notice of the person's right to be represented by counsel.

(b) Modification of Probation or Supervised Release. A hearing and assistance of counsel are required before the terms or conditions of probation or supervised release can be modified, unless the relief to be granted to the person on probation or supervised release upon the person's request or the court's own motion is favorable to the person, and the attorney for the government, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term of probation or supervised release is not favorable to the person for the purposes of this rule.

(c) Production of Statements.

(1) In General. Rule 26.2(a)-(d)

and (f) applies at any hearing under this rule.

(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.

STATEMENT OF THE CASE

A. Procedural History

Petitioner, Manfred DeRewal was indicted on March 9, 1988 and arrested on October 19, 1988. The indictment charged DeRewal with:

Count 1: Conspiracy to Import P2P in violation of 21 U.S.C. § 963;

Count 2: Importation of P2P in violation of 21 U.S.C. § 952(2) and § 960(2)(1), and;

Count 3: Attempt to Import P2P in violation of 21 U.S.C. § 952(3) and § 960(2)(1).

A Motion to Suppress Evidence was denied and the case proceeded to trial by jury on January 25, 1989. On February 7, 1989 a verdict of guilty was entered on all three counts. DeRewal was sentenced to an aggregate ten year term of confinement, followed by special parole of ten years and five years' probation consecutive to the special parole. An appeal was filed in the United States Court of Appeals for the Third Circuit which

affirmed the judgment of conviction. This Honorable Court refused to grant certiorari.

DeRewal then filed a *pro se* motion for new trial pursuant to Fed. R. Crim. P. 33, on March 22, 1991, claiming newly discovered evidence. That motion was denied on July 9, 1991. An appeal was filed in the United States Court of Appeals for the Third Circuit, and was dismissed by agreement on January 2, 1992.

A Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 was filed on April 21, 1992. The District Court adopted the Report and Recommendation of the magistrate judge and denied the motion on December 22, 1992. An appeal was taken to the Third Circuit which reversed in part and affirmed in part. The opinion in that case is reported at 10 F.3d 100. This Honorable Court refused to grant certiorari with reference to that portion of the Third Circuit's Order affirming the District Court.

The Motion to Vacate, Set Aside or Correct Sentence was denied by the District Court on August 22, 1995. That matter is currently on appeal to the United States Court of Appeals for the Third Circuit.

On September 7, 1994, DeRewal was charged with a violation of probation, and on February 1995 after a hearing, the District Court found him in violation of probation and imposed a sentence of three years incarceration. An appeal was taken to the United States Court of Appeals for the Third Circuit which affirmed the decision of the District Court. The instant Petition follows.

B. Basis for Federal Jurisdiction

The jurisdiction of the District Court was initially invoked in

this case under 28 U.S.C. § 3231, in that the indictment alleged the commission of federal criminal offenses. The proceedings considered herein were based upon 18 U.S.C. §§ 3651 and 3653. The jurisdiction of the Court of Appeals rested upon 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), as to Petitioner's appeal.

C. Statement of Facts

Manfred DeRewal was convicted of conspiracy to import P2P into the United States, importation of P2P and the attempt to import P2P. He was sentenced to an aggregate sentence of ten years incarceration, to be followed by special parole of ten years, and five years probation to commence at the expiration of special parole. His initial sentence expires on October 18, 1998, at which time the special parole was to commence. That sentence expires on October 17, 2008, at which time the sentence of probation was scheduled to commence.

On September 7, 1995 a Probation Violation was filed, claiming that DeRewal had associated with an ex-felon, had not been truthful with his probation (parole) officer and that he had committed a crime, although he had not been charged with a criminal violation.

DeRewal filed a Motion to Dismiss the Probation Violation Petition alleging that as he was on parole and as the consecutive probationary sentence was not scheduled to commence for fourteen years, that the probation violation was improperly filed. That motion was denied by the District Court.

Prior to the violation hearing, DeRewal's counsel made a request for discovery which included relevant portions of the parole officer's file. The request was denied prior to the hearing and renewed after the officer testified. It was again denied. The government refused to make any of the requested information

available, and claims that it has no duty to make it available, in part basing its position on a cursory review of the parole officer's file by the District Court. However, that review was directed towards an unsuccessful attempt by the District Court to corroborate certain allegations made by the parole officer and not towards whether the entries in the officer's file supported his testimony. Despite DeRewal's specific requests for production of the file and despite the District Court's inability to find corroboration in the report of a claim made by the parole officer, the District Court would not make the file available for use during cross-examination of the parole officer. The Court of Appeals refused to apply the provisions of Fed. R. Crim. P. 26.2 to this case.

DeRewal was charged with violation of a Condition of Probation which was materially different from the corresponding conditions rendered at the time of sentence which required DeRewal to ". . . associate only with law abiding persons." The amended condition prohibited association with those engaged in criminal activity and ". . .with any person convicted of a felony." DeRewal claimed that the modification of the term of probation was contrary to Fed. R. Crim. P. 32.1(b). Both the District Court and the Court of Appeals found that the change was not a modification of the condition, but rather a clarification thereof.

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT DID NOT HAVE JURISDICTION TO VIOLATE DeREWAL'S PROBATION AS IT WAS CONSECUTIVE TO A SENTENCE OF PAROLE HE WAS SERVING AND WAS NOT DUE TO COMMENCE UNTIL 2008, WHICH WAS FOURTEEN YEARS FROM THE ALLEGED VIOLATION.

A. A Violation of Parole Should Not Provide the Basis to Violate a Consecutive Sentence of Probation Which Has Not Yet Commenced.

United States v. Wright, 744 F.2d 1127 (5th Cir. 1984) is a mirror image of DeRewal's case. Wright was serving a sentence of parole, with a consecutive sentence of probation to follow. He violated the conditions of his parole and a charge of violation of probation was filed. The Fifth Circuit held that once the sentence of parole commenced, there was no authority to revoke the sentence of probation which had not yet commenced. *Wright* held at 744 F.2d 1128:

> The violation of his **parole** (emphasis in original) condition, while on parole from the sentence of imprisonment on the first count, may have been a ground for a revocation of this **parole** (emphasis in original); but it was not, additionally, a ground to revoke the probation on the second count's sentence, which had not yet commenced.

Affronti v. United States, 350 U.S. 79, 82-83, 76 S. Ct. 171, 173-74, 100 L. Ed. 62 (1955) pointed out that probation is

authorized by statute and any court action is governed by the statute, the federal courts being without any inherent power or authority to grant or modify probation once the defendant commenced serving a sentence of incarceration. *Affronti, id.*, holds that:

> . . . it is unlikely that Congress would have found it wise to make probation apply in such a way as to unnecessarily overlap the parole and executive clemency provisions of the law.

See also, United States v. Murray, 275 U.S. 347, 357, 48 S. Ct. 146, 149 (1928), which holds that it was unlikely that Congress would have made parole, probation and executive clemency applicable to the same crime at the same time. A more reasonable construction would be to reconcile the provisions for the three methods, causing them to have as little repetition as possible.

United States v. Veatch, 792 F.2d 48, 50 (3d Cir. 1986) noted that an exception to the rule of *Affronti, supra,* exists where the defendant has not yet commenced serving the sentence of incarceration, because in that instance, the trial judge's discretion to revoke probation would not conflict with the executive's prerogatives. Accordingly:

> . . . during the period when the defendant is at liberty pending appeal, the concerns that influenced *Affronti* do not exist. In that interval, there is no conflict between the court's authority and the executive's responsibility for confinement or clemency.

792 F.2d at 52.

In *United States v. Williams*, 15 F.3d 1356, 1357 (6th Cir. 1994), *cert. denied*, __ U.S. ___, 115 S. Ct. 431, 130 L. Ed. 2d 344 (1994), relied upon by the Court of Appeals in the instant matter (66 F.3d at 54), it was held that the District Court had the power to revoke probation for conduct engaged in while on parole. However, the Third Circuit misstated the case by noting that the facts in *Williams* were substantially identical to DeRewal. They were not! Williams had completed parole and was serving his sentence of probation, and the violation was the conviction of a crime during the period of probation, upon facts which occurred while he was on parole. Accordingly, there was no conflict between the executive and judicial branches. DeRewal was not yet on probation at the time of either the violation or the sanction, the sentence of probation not being scheduled to commence until 2008.

The Court of Appeals also based its decision in *DeRewal* on the plurality opinion of Circuit Judge Sloviter in *United States v. Camarata*, 828 F.2d 974 (3d Cir. 1987), which held that *Affronti, supra*, should be confined to the power to grant probation, and its analysis should not apply to revocation. However, as in *Williams, supra*, the facts in *Camarata* are easily distinguished from *DeRewal*. In *Camarata*, the defendant was free on bail and not subject to any authority other than the District Court. 828 F.2d at 981 (Becker, J., concurring), Judge Sloviter in the plurality opinion also noted that Camarata was not on parole and accordingly was not subject to dual jurisdiction. 828 F.2d at 978.

DeRewal, as has been pointed out, was on parole, not probation.

The decision of the Third Circuit not only conflicts with *Wright, supra* and *Williams, supra*, but with numerous other Courts of Appeals which have considered variations of the question. The various situations include:

1. Violation Committed Prior to the Sentence Being Served: *United States v. Fryar*, 920 F.2d 252 (5th Cir. 1990); *United States v. Johnson*, 892 F.2d 369 (4th Cir. 1989); *United States v. Daly*, 839 F.2d 598 (9th Cir. 1988); *United States v. Camarata, supra; United States v. Veatch, supra; United States v. Ross*, 503 F.2d 940 (5th Cir. 1974).

2. Violation During Parole, Punished During Consecutive Probation: *United States v. Williams, supra.*

3. Violation While Serving a Sentence, Punished During Consecutive Probation: *United States v. Davis*, 828 F.2d 968 (3d Cir. 1987); *United States v. Yancey*, 827 F.2d 83 (7th Cir. 1987).

4. Violation After Conviction and Prior to Sentencing: *United States v. James*, 848 F.2d 168 (11th Cir. 1988).

5. Violation Where Parole and Probation Are Concurrent: *United States v. King*, 990 F.2d 190 (5th Cir. 1990).

The split in authority deserves consideration by the Court, to consider and correct what counsel believes is an improper extension of the authority of the District Court.

B. The Sentence of Probation Had Not Commenced at the Time of the Violation.

The Judgment in DeRewal's case (Appendix F) specifies that the sentence of probation is consecutive to the sentence of incarceration and special parole. That sentence was to commence in 2008. The Third Circuit referred that situation in passing (66 F.3d 52), but refused to consider the claim that the effect of applying the conditions of probation to DeRewal during the entire period of the sentences of incarceration (including parole)

and during special parole, effectively results in a sentence of probation far in excess of the five years maximum called for by 18 U.S.C. § 3651.

A sentence must have a definite beginning and a definite terminus. In the case at bar, the District Court established when probation would begin. It should not be permitted to change that to accommodate its desire to bring DeRewal within its jurisdiction.

United States v. Einspahr, 35 F.3d 505 (10th Cir. 1994) considered a sentence of probation which was to run consecutive to a sentence of imprisonment. The court held that the sentence clearly indicated that the probation was not to run concurrent with the sentence or with any period of parole supervision. At 35 F.3d 506, the court stated:

> The intent of the sentencing court must guide any retrospective inquiry into the term and nature of a sentence. [T]he controlling consideration [in interpreting when a probation period commences] is the intention of the Court imposing the sentence, to be found in the language employed to create the probationary status. . .
>
> Consecutive sentences are designated as such precisely because no gap or overlap between the respective sentences is contemplated. As the Eleventh Circuit observed in *United States v. Chancey,* 695 F.2d 1275 (1982): "This consecutive sentencing evinces the court's intent first, that there be no hiatus between the end of the first sentence and the beginning of the term of probation and,

> second, that there be no overlap between the end of the first sentence and the beginning of probation." *Id.* at 1276-77. Unless the sentencing court specifically indicates that a consecutive sentence of probation begins at a prisoner's release from custody or confinement, the default assumption is that the full term of the earlier sentence must be completed before the probation period commences.
>
> The granting of parole to a prisoner does not terminate the sentence that he is serving. Rather, supervision in the prison setting is replaced with supervision by probation authorities. The confinement period and any subsequent period of parole supervision are best understood as two parts "of a single indivisible sentence." *United States v. Thompson*, 979 F.2d 743, 744 (9th Cir. 1992). Accordingly, Mr. Einspahr's parole period must be regarded as part of his sentence on Count I. The hourglass was not turned to begin his probation until the conclusion of that parole period.

United States v. Flynn, 49 F.2d 11 (1st Cir. 1995) looks to the intent of the sentencing court as the controlling consideration in determining when probation begins. That case pointed out that where the court specifically indicates when the sentence begins such direction must be followed. *See also, Williams, supra,* 15 F.3d at 1359, n. 3 and *King, supra,* 990 F.2d at 192.

The question of Separation of Powers was held to be of no importance by the Third Circuit in its decision in *DeRewal* (66

F.2d at 55). However, in terms of the manner in which the penalty is applied, it is of significance.

Einspahr, supra at 36 F.3d 507 notes that criminal sentencing exists where legislative, judicial and executive prerogatives meet, citing *Mistreeta v. United States*, 488 U.S. 361, 363-368, 109 S. Ct. 647, 650-53, 102 L. Ed. 714 (1989). Congress determines the range of sentence, the courts impose the sentence and the executive grants parole.

The power to grant probation should not be interfered with by parole where it is a consecutive sentence unless the court expressly states probation is to begin at the release from confinement. Where it does not begin upon release, and as in DeRewal's case is to begin at the expiration of sentence (including parole), that is when it should commence.

DeRewal's probation was to begin at the conclusion of special parole, not some fourteen years earlier. Certiorari should be granted because of the conflict between the circuits, to clarify the law and to right a grievous wrong.

II.

THE REFUSAL TO REQUIRE THE PRODUCTION OF STATEMENTS AS REQUIRED BY FED. R. CRIM. P. 26.2(a) WAS A DENIAL OF DUE PROCESS OF LAW.

Prior to the violation hearing, a request was made for production of the parole officer's file as required by Fed. R. Crim. P. 32.1(a)(2)(B). The government objected and request was refused. After the officer testified, the request to produce his records was renewed, and again refused despite the provisions of Fed. R. Crim. P. 26.2(a) which requires the government to produce any statement of a witness which relates to the testimony

of that witness. That Rule is specifically made applicable to probation revocation hearings by Rules 26.2(g), and by Rule 32.1(c)(1), with the specific sanction imposed by Rule 32.1(c)(2) that if a statement is withheld, the court may not consider the testimony of that witness.

The District Court completely ignored Rule 26.2. The Third Circuit did not even consider Rule 26.2, basing its decision on Rule 32.1(a)(2)(B), noting that neither the rule nor case law required production of the officer's entire file ". . . even where the officer is a witness." The Court of Appeals also held that DeRewal was given relevant documents from the file and was ". . . further protected by the district court's in camera review." 66 F.3d at 55.

The Third Circuit not only refused to apply the proper rule of criminal procedure, it misstated the facts to reach its conclusion.

At the violation hearing, the District Court judge questioned a statement attributed to DeRewal by the parole officer and examined his file to determine if the statement was included in the officer's notes. It was not, and the court provided counsel with two pages of documents which covered the incident in question. That was the extent of the "in camera" review of a voluminous file which took place over a lunch break. There is no indication that the file was examined in its entirety, and the government made no claim of privilege or non-relevant matter as provided by Rule 26.2(c).

The provisions of Rule 26.2 were ignored by the lower courts, resulting in a denial of due process of law to DeRewal. The adamant refusal of the government to refuse to produce the statements rises to the level of a *Brady v. Maryland*, 373 U.S. 83 (1963) violation, or at the very least, a violation of the Jencks Act, 18 U.S.C. § 3500. Indeed, the Notes of Advisory Committee on

Rules in discussing the 1993 Amendment which added Fed. R. Crim. P. 26.2(g), notes that extending the rule to other adversary type hearings serves the need for information which affects the credibility of the government witness. In the case of the supervising officer presenting the case against Petitioner, largely based on information from his own records, the significance of the opportunity for the defense to properly examine that individual cannot be understated.

As discussed in *Jencks v. United States*, 353 U.S. 657, 667, 77 S. Ct. 1007, 1013 (1957), the importance of prior statements of witnesses for impeachment purposes is invaluable for cross-examination purposes. This Court noted:

> The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.

Id., 353 U.S. at 671, 77 S. Ct. at 1015.

The Third Circuit ignored the rule of *Jencks* as well as its own decision in *United States v. Rosa (Appeal of Plisco)*, 891 F.2d 1074 (1989) which held that *Jencks* material must be supplied the defense at sentencing, ". . . the most critical stage of criminal proceedings." *Id.*, 891 F.2d at 1074. The denial of the benefit of Rule 26.2 in DeRewal's proceedings denied him due process of law, and this Honorable Court is respectfully urged to establish a mandatory bright line rule requiring production of such statements.

III.

THE ADMINISTRATIVE MODIFICATION OF A CONDITION OF PROBATION WHICH DID NOT FOLLOW THE DIRECTIVE OF FED. R. CRIM. P. 32.1(b) VIOLATED PETITIONER'S RIGHTS TO DUE PROCESS OF LAW AND ASSISTANCE OF COUNSEL.

The Judgment[1] in DeRewal's case specified the conditions of probation, noting:

> Where probation has been ordered, the defendant shall: . . . (2) associate only with law abiding persons . . .

Upon his release on parole, the Conditions of Probation had been changed administratively[2] and the corresponding section reads:

> It is the order of the Court that you shall comply with the following standard condition: . . . (9) you shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer . . .

DeRewal was charged with violating the latter condition. He objected to the change in condition as being in violation of Federal Rule of Criminal Procedure, 32.1(b), which requires a hearing and assistance of counsel before the terms or conditions of probation can be modified. The Notes of the Advisory

1. Attached as Appendix F.

2. Attached as Appendix G.

Committee on Rules (1979 Addition) points out that as a modification of probation is part of the sentencing procedures, a hearing with counsel is required.

The Third Circuit followed the lead of the District Court and agreed that the change in description of the condition merely clarified the condition without making a substantive change, holding that the change itself was insignificant. 66 F.3d at 55. Such an interpretation fails to consider the fact that the document which purported to change the conditions of probation, Monograph 109 of the Administrative Offices of the United States Courts, Probation and Pretrial Services Division completely revamped and expanded all of the conditions of probation as ordered at DeRewal's sentencing. Applying the modified conditions to him was a direct violation of Fed. R. Crim. P. 32.1, and represented a denial of due process and the right to counsel.

Further, the original condition (2) was completely rewritten, adding to the requirement that the probationer associate only with law abiding persons, a prohibition against association with those persons convicted of a felony, an entirely different and additional class of persons.

There is a little difference between "law abiding persons" and those "engaged in criminal activity" as defined in the new condition. However, a law abiding person may very well have a past felony conviction. The addition of the new class is more inclusive and differs from the original condition. As held in *United States v. Albanese*, 554 F.2d 543, 546 (2d Cir. 1977):

> A person disobeying the law today and hence not being law abiding may as yet have no criminal record, and a person with a past record may be entirely law abiding today.

> Thus it would be preferable if conditions phrased in terms of 'law abiding persons" were avoided when it is intended to proscribe association with persons having criminal records.

The change in the condition was far more than a mere clarification and the failure to follow the specified procedures in making the change violated DeRewal's rights to due process of law and to assistance of counsel. He is entitled to a reversal and to have the case returned to the district court.

CONCLUSION

For the reasons set forth above, this Honorable Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — SUR PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED OCTOBER 16, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1142

UNITED STATES OF AMERICA

vs.

MANFRED DeREWAL,

Appellant

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*,
BECKER, STAPLETON, MANSMANN, GREENBERG,
SCIRICA, COWEN, NYGAARD, ALITO, ROTH,
LEWIS, MCKEE and SAROKIN,
Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

s/ [illegible]
Circuit Judge

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED SEPTEMBER 15, 1995

Filed September 15, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1142

UNITED STATES OF AMERICA

v.

MANFRED DEREWAL,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 88-cr-00098)

Argued
August 2, 1995

Before: MANSMANN, HUTCHINSON and ROTH,
Circuit Judges.

(Filed September 15, 1995)

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OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

In this appeal from the district court's order revoking Manfred DeRewal's probation, we address chiefly DeRewal's primary contention regarding the tension between the power of the judiciary to act on probation matters and the executive branch's power governing parole since DeRewal was on parole when the district court revoked DeRewal's probation that had not yet begun. This is an issue we specifically reserved in *United States v. Camarata*, 828 F.2d 974 (3d Cir. 1987), *cert. denied*, 484 U.S. 1069 (1988).

We hold that the district court properly exercised its jurisdiction in revoking DeRewal's probation for pre-

probation conduct occurring during a period of parole. Such judicial action regarding probation does not disturb the executive branch's authority to control DeRewal's parole.

DeRewal also contends that the conditions of his probation were modified without a hearing as required by Federal Rule of Criminal Procedure 32.1(b), that the district court erred in refusing to grant him access to the probation officer's entire file, and that there was insufficient evidence for the district court to find a violation of probation. We have considered each of the allegations of error and, finding them to be without substance, we will affirm the order of the district court.

I.

In March, 1988, Manfred DeRewal was charged with conspiracy to import P2P, importation of P2P, and attempting to import P2P into the United States from Costa Rica in violation of 21 U.S.C.A. §§ 952(a), 960(a)(1), 963 (West 1981) and 18 U.S.C.A. § 2 (West 1969). Following conviction, DeRewal was sentenced to 10 years of imprisonment followed by a ten year term of special parole. A five year probationary term was to run consecutively to the term of special parole.[1]

On December 17, 1992, DeRewal was released from

1. DeRewal's direct appeal from the judgment of conviction and sentence was affirmed on October 12, 1989. DeRewal then filed a petition pursuant to 28 U.S.C. § 2255 raising ineffective assistance of counsel and other claims. The district court denied the petition. On appeal, we affirmed in part, reversed in part, and remanded the matter to the district court. *See United States v. DeRewal*, 10 F.3d 100 (3d Cir. 1993) (holding that a defendant is not required to show "cause and prejudice" with respect to his failure to raise ineffective assistance of counsel on direct appeal).

prison on parole, parole to run until October 18, 1998. The term of special parole would then run from 1998 until 2008, when the probationary period would begin.

On September 7, 1994, the United States Probation Department filed a Violation of Probation Petition against DeRewal, alleging that he had violated those three conditions of probation which required him (1) to answer truthfully inquiries from and follow the instructions of his probation officer; (2) to refrain from associating with those engaged in criminal activity or convicted of a felony; and (3) to refrain from violating any law.

DeRewal's motion to dismiss the petition for lack of jurisdiction was dismissed and a hearing was held on the merits of the Probation Department's Petition. DeRewal filed a motion seeking to review his probation file in its entirety. Following the district court's denial of this motion, the government presented the testimony of DeRewal's neighbor who had overheard telephone conversations as a result of an illegal splice into her telephone line. Testimony was also given by telephone employees, DeRewal's probation officer, and FBI agents.

At the conclusion of the testimony, the district court found that DeRewal had violated the terms of his probation and sentenced him to 36 months imprisonment. This timely appeal followed in which we confront the issue of judicial power to alter probation during a pre-probation period of parole which is governed by the authority of the executive branch.

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II.

In *Affronti v. United States*, 350 U.S. 79 (1955), the Supreme Court confronted the question of whether a district court has authority to place a defendant on probation once he has begun to serve the first in a series of consecutive sentences. The Court cautioned that statutory authority *to grant probation* should not be "applied in such a way as to necessarily overlap the parole and executive clemency provisions of the law" and should be interpreted "to avoid interference with the parole and clemency powers of the Executive Board." *Affronti*, 350 U.S. at 83. The Court then concluded, utilizing broad language, that "the probationary power ceases with respect to all of the sentences composing a single cumulative sentence immediately upon imprisonment for any part of the cumulative sentence." *Id.*

In *United States v. Williams*, 15 F.3d 1356, 1357 (6th Cir.), *cert. denied*, 115 S. Ct. 431 (1991), the Court of Appeals for the Sixth Circuit concluded that "a district court does have authority to revoke probation for pre-probation conduct, including the pre-probation conduct of a paroled convict." On facts substantially identical to those presented here, our sister court of appeals noted that 18 U.S.C. § 3651, applicable to offenses committed prior to November 1, 1988, unambiguously provides that

> [t]he court may revoke or modify any condition of probation, or may change the period of probation.

The court then considered whether a district court's revocation of probation based upon conduct committed while a defendant was on parole would raise a separation of powers concern. Finding that no such concern was implicated, the court analyzed *Affronti*:

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> In *Affronti*, the Supreme Court held that once a convict has begun serving a custodial sentence, a court may not modify a subsequent custodial sentence into a probational sentence. The Supreme Court reasoned that such authority would interfere with the executive's power to make decisions concerning parole and executive clemency.

United States v. Williams, 15 F.3d at 1362. The court emphasized that where parole is *revoked*, the logic of *Affronti* breaks down.

> Where a convict's pre-probation conduct prompts a court to revoke a sentence of probation . . . the court does not modify an existing custodial sentence. Rather, the court effectively converts a probationary sentence into a custodial sentence. The possibility that a probationary sentence would be converted into a custodial sentence is inherent in the very notion of probation. Furthermore, the conversion of a probationary sentence into a custodial sentence still leaves the executive free to administer the converted sentence . . . Further, judicial authority to revoke probation for pre-probation conduct seems especially unlikely to disrupt the balance of power in cases such as this in which agents of the executive have requested the court to revoke probation.

Id. at 1363-64.

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We conclude, as did the court in *Williams*, that neither the statute granting the district court authority to revoke or modify a period of probation nor the Supreme Court decision in *Affronti* suggests that it was error for the district court to revoke DeRewal's probation. Because "the authority to revoke probation for pre-probation conduct does not concentrate power in the judiciary so as to disrupt the balance of power amongst the legislative, executive, and judicial branches," the rule announced in *Affronti* is not undermined. *Id.* The district court's revocation of probation does not interfere with the ability of the executive branch to alter DeRewal's parole. The power to act under this factual scenario is not exclusively vested in the executive branch; parole and probation are mutually exclusive, respectively controlled by the executive branch and the judiciary.

We note DeRewal's assertion that the district court lacked jurisdiction to entertain a Petition for Violation of Probation where DeRewal was on parole when his probationary term was not to commence until the year 2008 finds support in the decision of the Court of Appeals for the Fifth Circuit in *United States v. Wright*, 744 F.2d 1127 (5th Cir. 1984). There, on facts very similar to those now before us, the court held that the district court has no authority to revoke probation for conduct committed during a period of parole where the defendant has been sentenced in the same case to a consecutive term of probation.

Although dealing with different facts,[2] Chief Judge

---

2. Following conviction on several counts of a federal indictment, Camarata was sentenced to imprisonment and a consecutive term of probation. Prior to completion of the term of imprisonment, Camarata committed additional crimes. The district court relied upon these crimes in revoking probation.

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Sloviter, the writer of the lead opinion for the court in *Camarata* was critical of *Wright*, and supportive of the *Williams* approach. Rejecting Camarata's arguments based on *Wright* and *Affronti* she found *Affronti* to be of limited application:

> [In *Affronti*,] the Court stated that it was "concerned with the power to *grant* supervision of [unexecuted] sentences." It framed the question as whether it should "read the statute to mean that courts should be able to *suspend* the uncommenced terms of a cumulative sentence after the prisoner has been imprisoned and entered upon the execution of a prior term?" and answered in the negative. *Affronti* did not deal with the district court's power to revoke probation. As Judge Pollak, the district judge in this case, explained, "to revoke probation is not to pose the difficulties of overlap which conflicted with the parole and clemency authorities" since "[r]evoking a probationary term which follows a term of incarceration does not stop the parole authorities from making such adjustments of the term of incarceration as they think appropriate."

828 F.2d at 979 (citations omitted). We agree with her analysis.

We here state our agreement with the analysis of the Court of Appeals for the Sixth Circuit in *Williams* where, on

analogous facts, it concluded that *Affronti* was misapplied in *United States v. Wright* and should not be read to prohibit the district court from revoking probation based on pre-probationary conduct.

III.

Having resolved that there was no jurisdictional impediment to the district court's action, we turn next to DeRewal's argument that the conditions of his probation were amended in violation of Fed. R. Crim. P. 321(b). The Conditions of Probation Nos. 2 and 6 on the Judgment and Commitment Order specified that DeRewal was to "(2) associate only with law-abiding persons and maintain reasonable hours; . . . [and] (6) follow the probation officer's instructions and report as directed," but the form that his probation officer required him to sign stated that "you shall not associate with any persons engaged in criminal activity, and shall not associate with any persons convicted of a felony unless granted permission to do so by the probation officer." DeRewal was found to have violated the latter condition. He objects that the different wording on the probation form made the applicable condition much more onerous and "added an entirely different class of person with whom DeRewal was not allowed to associate."

We believe that the distinction between these two conditions is insignificant. Any violation of the second version would certainly have contravened the first version as well. We also agree with the district court that the difference in the language of the two sections "is not a modification or enlargement of the conditions of a sentence of probation under . . . Fed. R. Crim. P. 32.1(b). The change in the description of

the condition clarified the condition but did not make a substantive change." *United States v. DeRewal*, No. 88-00098-01, slip op. at 5-6 (E.D. Pa. Feb. 7, 1995).

IV.

Federal Rule of Criminal Procedure 32.1(a)(2)(B) provides that, at a revocation hearing, a defendant is entitled to "disclosure of the evidence against him." The caselaw is in accord. *See, e.g., United States v. Guardino*, 972 F.2d 682, 689 (6th Cir. 1992). Neither the rule nor the caselaw can reasonably be read, however, to require automatic production of a probation officer's entire file, even where the officer is a witness. The record before us establishes that DeRewal was provided with relevant documents from the file and was further protected by the district court's in camera review. We conclude that the district court did not err in refusing to order the production of the probation officer's entire file.

V.

Lastly, we address DeRewal's contention that the evidence adduced at the revocation hearing was insufficient to establish a violation of probation. "In order to revoke probation, it is necessary 'only that the court be reasonably satisfied that [the probationer] has violated one of the conditions of his probation.' " *United States v. Barnhart*, 980 F.2d 219, 223 (3d Cir. 1992) (quoting *United States v. Manuszak*, 532 F.2d 311, 317 (3d Cir. 1976)). Having reviewed the record before us, we are satisfied that the evidence fully supports the district court's exercise of its discretion in revoking DeRewal's probation for the reasons set forth in its February 7, 1995 Memorandum and Order.

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VI.

We will affirm the district court's order of February 7, 1995 revoking DeRewal's probation and sentencing him to three years imprisonment.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED SEPTEMBER 15, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1142

UNITED STATES OF AMERICA

vs.

MANFRED DEREWAL,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 88-cr-00098)

Before: MANSMANN, HUTCHINSON and ROTH,
Circuit Judges.

Present: Mansmann, Hutchinson and Roth, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on August 2, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District

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Court entered on February 10, 1995, be, and the same is hereby affirmed in accordance with the opinion of this Court.

ATTEST:
s/ P. Douglas Sisk
Clerk

Dated: September 15, 1995

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED FEBRUARY 9, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO.

88-00098-01

UNITED STATES OF AMERICA

v.

MANFRED DEREWAL

MEMORANDUM AND ORDER

J. M. KELLY, J. **FEBRUARY 7, 1995**

The court has considered the testimony and evidence that has been presented at the Violation of Probation hearing held in this case and is prepared to make its Findings of Fact and Conclusions of Law and decision.

FINDINGS OF FACT

1. In December of 1992, Defendant was paroled from his ten-year sentence for conspiracy to import Phenyl-2-Propanone (P2P) and attempt to import P2P.

2. Defendant was released subject to certain terms of supervision, which were reviewed with him by his Probation Officer, Elwood H. Hippel, Jr.

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3. One condition of his supervision was that Defendant truthfully answer all inquiries by the probation officer and follow the instructions of the probation officer.

4. Another condition of his supervision was that Defendant only associate with law-abiding citizens. That condition was amended to read that Defendant not associate with any persons engaged in criminal activity and not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

5. Defendant's probation officer reviewed the condition regarding, non-association with criminals with Defendant.

6. The third condition that is at issue is that Defendant was not to commit another federal, state or local crime.

7. On March 2, 1994, the Federal Bureau of Investigation (FBI) and the Drug Enforcement Administration (DEA) executed a federal search warrant of Defendant's residence, the Boarhead Farm, located in Bucks County, Pennsylvania.

8. Defendant arrived at Boarhead Farm or March 2 with David Mostellar.

9. Defendant knew Mr. Mostellar to be a convicted felon, as Defendant and Mr. Mostellar both served parts of their sentences at the Federal Correctional Institution ("FCI") at Loretto, Pennsylvania.

10. Defendant acknowledged his contact with Mr. Mostellar.

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11. In March of 1993, Defendant requested permission from the probation officer to travel to Washington, D.C. to attend the Atlantic States Marine Fisheries Commission Conference.

12. In support of his request, Defendant provided a letter from a company named Pioneer Ecology in Richmond, Virginia. The letter was signed by M. Dana DeVore, President.

13. Pioneer Ecology's address was a post office box registered to David Mostellar.

14. In a later letter, Ms. DeVore stated that Pioneer Ecology was part of Evergreen Corporation.

15. Mr. Mostellar has stated that Evergreen Corporation is his shipping company.

16. Lori Dolinsky Cook resides near Defendant's residence, Boarhead Farm.

17. In February of 1993, Ms. Cook discovered that calls that she had not made had been charged to her facsimile line.

18. Ms. Cook also had problems using her facsimile at about the same time.

19. In attempting to discover the problem with her facsimile machine, Ms. Cook came to overhear conversations being held on her facsimile line.

20. In overhearing these conversations, Ms. Cook learned that one of the parties was Defendant, Manfred DeRewal.

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21. Ms. Cook heard Defendant discussing several "projects" that would be profitable with the other party to the phone conversation.

22. Ms. Cook heard Defendant discuss the need to speak to the other man about the projects in person and requiring permission to travel to meet the other man.

23. Ms. Cook heard the other man suggest that the other man write a letter of invitation on his letterhead to attend the Atlantic Fisheries Commission convention in Washington, D.C. so that it sound "on the up and up".

24. The letter written by Ms. DeVore invited Defendant to attend the Atlantic Fisheries Commission convention in Washington, D.C.

25. Although Ms. DeVore signed the letter inviting Defendant to the convention as President of Pioneer Ecology, Ms. DeVore appears to have no knowledge about Pioneer Ecology or much of the substance of the letter written to Defendant.

26. Ms. DeVore appears to have little knowledge about the letter she wrote explaining Pioneer Ecology's relationship to Evergreen.

27. Ms. Cook's telephone line was charged with numerous phone calls that she had not made, including calls to Costa Rica, Florida, Texas, Nevada and California.

28. Employees of Bell Atlantic discovered that there was an illegal hook-up to Ms. Cook's telephone line from Boarhead Farm, the residence of Defendant.

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29. In the early months of 1993, when the various calls from Boathead Farm were charged to Ms. Cook's account, Defendant was aware that there was no authorized telephone service at his Boarhead Farm.

30. Although he was aware that the phone service at his residence was unauthorized, Defendant made numerous calls from his residence.

31. In a phone conversation overheard by Ms. Cook, Ms. Cook heard Defendant instruct a woman to cash in his "CD's" held in other people's names in Costa Rica for Costa Rican currency and not U.S. currency to avoid "trouble".

32. As a part of his sentence, Defendant had a committed fine of $30,000.00.

33. When he was released from FCI, Loretto in 1992, Defendant took the Oath of an Indigent Prisoner, swearing that he had no property exceeding twenty dollars with the exception of exempt property.

34. Defendant maintained in his financial statements to the probation officer in 1993 that he had no assets.

35. Defendant stated at a deposition in 1993 that he had no assets.

CONCLUSIONS OF LAW

1. The change in the wording of the condition from permitting Defendant to associate only worth law-abiding citizens to prohibiting Defendant from associating with

persons engaged in criminal activity or convicted felons is not a modification or enlargement of the conditions of a sentence of probation under 18 U.S.C. § 3563(c) and Fed. R. Crim. P. 32.1(b). The change in the description of the condition clarified the condition but did not make a substantive change.

2. Defendant was untruthful to his probation officer by submitting the letter for permission to travel to the Atlantic Fisheries Commission Conference and by submitting financial statements that denied ownership of any assets. The testimony of Ms. Cook and Ms. DeVore establish that Defendant submitted the letter in order to meet with Mr. Mostellar. Ms. Cook's testimony shows that Defendant was untruthful in swearing that he had no assets.

3. As shown by Ms. Cook's testimony and the letters regarding the fisheries conference, Defendant was associating with David Mostellar, whom Defendant knew to be a convicted felon from serving part of his sentence with Mr. Mostellar at FCI, Loretto. Thus, Defendant violated the condition of his sentence that prohibited association with a convicted felon.

4. Defendant violated the condition of probation that prohibited commission of another federal, state or local crime by using a telephone that was illegally connected from his residence.

5. Defendant violated 18 U.S.C. § 1001 by stating that he had no assets, which was a false statement, in his financial statements to the probation officer and the Oath of an Indigent Prisoner taken at his release from FCI, Loretto.

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In consideration of the Petition for Violation of Probation, Defendant's Response, hearing thereon and the foregoing findings of fact and conclusions of law, the court finds that Defendant violated the following conditions of probation:

1) General Condition #3, that Defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

2) General Condition #9, that Defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer; and

3) General Condition that while on probation Defendant shall not commit another federal, state or local crime.

BY THE COURT:

s/ James McGirr Kelly
JAMES McGIRR KELLY

APPENDIX E — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED DECEMBER 23, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL ACTION

NO. 88-00098-01

UNITED STATES OF AMERICA

v.

MANFRED DEREWAL

MEMORANDUM AND ORDER

J. M. KELLY, J. **DECEMBER 23, 1994**

Presently before the court is Defendant Manfred DeRewal's Motion for Dismissal of the Probation Violation Petition for Lack of Jurisdiction. Defendant was convicted of conspiracy to import P2P, importation of P2P and attempt to import P2P in violation of 21 U.S.C. §§ 963, 952(a), 960(a)(1) and 18 U.S.C. § 2. Defendant was sentenced to ten years imprisonment with a ten-year special parole term to follow and to five years probation after that. In 1992, Defendant was paroled from the sentence of incarceration to continue on parole until 1998. The ten-year special parole would last from 1998 to 2008, and the probation would commence in 2008.

The United States Probation Office has alleged that

Defendant has violated his probation. Defendant claims that he may not be charged with a Violation of Probation because his term of probation has not yet commenced. Thus, he argues, the court does not have jurisdiction to revoke his probation. The Government's view is that the court does have the authority to revoke probation for conduct occurring prior to the beginning of the probationary term.

Defendant relies on a factually similar case, *United States v. Wright,* 744 F.2d 1127 (5th Cir. 1984). In *Wright,* as in this case, the defendant committed the violation while on parole before the beginning date of his probation. *Id.* at 1128. The defendant challenged the court's authority to revoke his probation. *Id.* The Fifth Circuit interpreted a Supreme Court case, *Affronti v. United States,* 350 U.S. 79 (1955), as prohibiting overlap between the probation provisions and parole and executive clemency provisions in the law. *Id.* at 1130. The court held that the defendant's violation of parole while on parole could not be grounds to revoke the probation that had not yet commenced. *Id* at 1128. Thus, Defendant DeRewal argues that this court is without authority to revoke his probation.

The court finds, however, that it does have jurisdiction over the probation violation petition. The Third Circuit's opinion in *United States v. Camarata,* 828 F.2d 974 (3d Cir. 1987), *cert. denied,* 484 U.S. 1069 (1988) indicates that result. In *Camalata,* the defendant committed a crime before the completion of his custodial sentence and before the beginning of his probation term. *Id.* at 975. The defendant challenged the district court's authority to revoke his probation. *Id.* The defendant also relied on *Affronti* to argue that the court did not have authority. *Id.* at 979.

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The Third Circuit noted that *Affronti* "did not deal with the district courts power to revoke probationer" but with the court's ability to mitigate sentences. *Id.* at 978-79. The Third Circuit agreed with the district court in *Camarata*, finding no overlap between the district court's authority to revoke probation and the parole and clemency authorities. *Id.* The court noted that, if the defendants view were accepted, it "would provide incarcerated defendants with a grace period in which their activity, no matter how heinous, could not affect their probationary release into society." *Id.* at 980. The court also rejected another of Defendant DeRewal's arguments, holding that the statutory maximum of five years of probation did not prevent the court from finding that the "defendant's conduct prior to the probationary term demonstrates . . . the need for a longer term of custody." *Id.* Thus, under the guidance of the Third Circuit, there is no bar to this court's determination of the probation violation petition.

Accordingly, in consideration of Defendant's Motion for Dismissal of the Probation Violation Petition for Lack of Jurisdiction, the Government's Response, and Defendant's Reply, it is hereby ORDERED that Defendant's Motion is DISMISSED.

BY THE COURT:

s/ James McGirr Kelly
JAMES McGIRR KELLY, J.

APPENDIX F — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED APRIL 10, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Case Number: 88-0098

UNITED STATES OF AMERICA

V.

MANFRED DEREWAL
FEDERAL CORRECTIONAL INSTITUTE
OTISVILLE, NEW YORK 10963

(Name and Address of Defendant)

A. CHARLES PERUTO, SR., ESQ.
Attorney for Defendant

* * *

THERE WAS A:

☒ verdict of guilty as to count(s) *1, 2 and 3*

* * *

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: ***Conspiracy to import P2P, importation of P2P, attempt to import P2P, Title 21, U.S.C., Sections 963, 952(a), 960(a)(1) and Title 18, U.S.C. Section 2.***

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IT IS THE JUDGMENT OF THIS COURT THAT:

COUNT 1 — Committed to the custody of the Attorney General or his authorized representative for a period of FIVE YEARS. Defendant is ordered to pay a committed fine of $15,000.00.

COUNT 2 — Committed to the custody of the Attorney General or his authorized representative for a period of FIVE YEARS, with a ten year special parole term to follow. In addition, defendant is ordered to pay a committed fine of $15,000.00. The sentence on Count 2 is to run consecutive to the sentence imposed under Count 1.

COUNT 3 — Imposition of prison sentence is suspended and defendant is placed on probation for five years. Said sentence is to commence at the expiration of the sentence imposed under Counts 1 and 2.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

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(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

* * *

☒ The Court orders commitment to the custody of the Attorney General and recommends:

That defendant be sent to a minimum security facility.

April 12, 1989
Date of Imposition of Sentence

s/ James Kelly
Signature of Judicial Officer

JAMES McGIRR KELLY, JUDGE, U.S. DISTRICT COURT
Name and Title of Judicial Officer

April 12, 1989
Date

Appendix F

cc: Deborah Rhodes, Esq.
A. Charles Peruto, Sr., Esq.
Jonathan Dunn, Esq.
G.B. Hester, Esq.
Probation
U.S. Marshall (2cc)
Pretrial Services

* * *

APPENDIX G — CONDITIONS OF PROBATION

Supervision of Federal
Offenders

MONOGRAPH 109

(supersedes *The Supervision Process,*
Publication 106)

Probation anti Pretrial Services Division
Administrative Office of the United States Courts
Washington, DC 20544

June 1991

* * *

- That the parolee not possess illegal controlled substances; and

- If a fine was imposed, that the parolee make a diligent effort to pay the fine in accordance with the judgment.

Standard Conditions of Supervision

Standard conditions apply to all persons under active supervision and provide authority for monitoring and controlling the offender. They are [see Ch. V.A.2A]J:

- You shall not commit another Federal, state, or local crime during the term of supervision;

- You shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;

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- You shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first 5 days of each month;

- You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

- You shall support your dependents and meet other family responsibilities;

- You shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

- You shall notify the probation officer within 72 hours of any changes in residence or employment;

- You shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

- You shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;

- You shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

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- You shall permit a probation officer to contact you at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

- You shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

- You shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

- As directed by the probation officer, you shall notify third parties of risks that may be occasioned by your criminal record or personal history or characteristics and shall permit the probation officer to make such notification and to confirm your compliance with such notification requirement.

Implementation of these conditions will be discussed further in Chapter IV.

* * *

Appendix G

Conditions of Probation and Supervised Release

PROB 7A
(Rev. 6/90)
ch 1-11-93

FOR THE

EASTERN DISTRICT OF PENNSYLVANIA

Name *Manfred Derewal* Docket No. *88-00428-01*

Address *1036 Old Bethlehem Road, Perkasie, PA. 18944*

Under the terms of your sentence, you have been placed on *supervised release* by the Honorable *James McGirr Kelly,* United States District Judge for the District of Eastern Pennsylvania. Your term of supervision is for a period of *10 years* , commencing upon release.

While on *supervised release*, you shall not commit another Federal, state or local crime and shall not illegally possess a controlled substance. Revocation of probation and supervised release is mandatory for possession of a controlled substance.

CHECK IF APPROPRIATE

☒ As a condition of supervision, you are instructed to pay a fine in the amount of *$30.000.00*; and it shall be paid in the following manner *on a schedule as determined by the probation office.*

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* * *

☒ The defendant shall not possess a firearm or destructive device. Probation must be revoked for possession of a firearm.

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons, and shall telephone the U.S. Probation Office for the Eastern District of Pennsylvania (215-597-7950).

It is the order of the Court that you shall comply with the following standard conditions:

(1) You shall not leave the judicial district without permission of the court or probation officer;

(2) You shall report to the probation officer as directed by the court or probation officer, and shall submit a truthful and complete written report within the first five days of each month.

(3) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) You shall support your dependents and meet other family responsibilities;

(5) You shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

(6) You shall notify the probation officer within seventy-two hours of any change in residence or employment;

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(7) You shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

(8) You shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

(9) You shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(10) You shall permit a probation officer to visit you at any time at home or elsewhere, and shall permit confiscation of any contraband observed in plain view by the probation officer;

(11) You shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement agency;

(12) You shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

(13) As directed by the probation officer, you shall notify third parties of risks that may be occasioned by your criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm your compliance with such notification requirement.

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The special conditions ordered by the court are as follows:

ON COUNT ONE, THE DEFENDANT IS SENTENCED TO THE CUSTODY OF THE ATTORNEY GENERAL FOR A PERIOD OF FIVE YEARS.

ON COUNT TWO, THE DEFENDANT IS SENTENCED TO THE CUSTODY OF THE ATTORNEY GENERAL FOR A PERIOD OF FIVE YEARS, WITH 10 YEARS' SPECIAL PAROLE TO FOLLOW. BOTH SENTENCES ARE TO RUN CONSECUTIVELY.

ON COUNT THREE, THE IMPOSITION OF A PRISON SENTENCE IS SUSPENDED AND THE DEFENDANT IS PLACED ON PROBATION FOR A PERIOD OF FIVE YEARS, WHICH IS TO COMMENCE AT THE EXPIRATION OF THE SENTENCE IMPOSED ON COUNTS ONE AND TWO.

A COMMITTED FINE OF $15,000 IS ORDERED ON COUNTS ONE AND TWO FOR A TOTAL OF $30,000.

THE COURT RECOMMENDS THAT THE ATTORNEY GENERAL CONSIDER SENTENCING THE DEFENDANT TO A MINIMUM SECURITY INSTITUTION BECAUSE OF HIS AGE.

ALL PAYMENTS ARE TO BE MADE PAYABLE TO THE CLERK, U.S. DISTRICT COURT AND MAILED TO THIS OFFICE.

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke

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supervision or (2) extend the term of supervision and/or modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions, and have been provided a copy of them.

(Signed)	**Manfred Derewal**	**1/19/93**
	Defendant	**Date**
s/ Elwood H. Hippel Jr.		**1/19/93**
U.S. Probation Officer/		**Date**
Designated Witness		

Supreme Court, U.S.
FILED
MAR 18 1996
CLERK

(2)

No. 95-1144

In the Supreme Court of the United States

OCTOBER TERM, 1995

MANFRED DEREWAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney
Department of Justice
Washington, D.C. 20530
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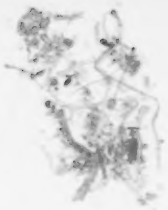
18 pp

QUESTIONS PRESENTED

1. Whether, under the now-repealed Federal Probation Act, the district court had authority to revoke petitioner's probation based on misconduct that occurred while petitioner was on parole before commencement of his scheduled term of probation.

2. Whether the district court erred in declining to require that a probation officer's entire file be disclosed in discovery at a probation revocation hearing.

3. Whether the conditions of petitioner's probation were modified without a hearing in violation of Fed. R. Crim. P. 32.1(b) based on the fact that the wording in the judgment and commitment order regarding the conditions of probation was slightly different from the wording in the form petitioner signed when he was released from prison.



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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1144

MANFRED DEREWAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-12a) is reported at 66 F.3d 52.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a) was entered on September 15, 1995. A petition for rehearing was denied on October 16, 1995. Pet. App. 1a. The petition for a writ of certiorari was filed on January 16, 1996 (a Tuesday following a legal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was sentenced to a term of imprisonment to be followed by a term of special parole, to be followed by a term of probation. After serving approximately four years of his term of imprisonment in prison, petitioner was granted regular parole for the remainder of that imprisonment term. While serving his regular parole term, petitioner was found by the district court to have violated the conditions of his probation. The court revoked petitioner's probationary sentence and imposed a sentence of 36 months' imprisonment. The court of appeals affirmed.

1. In 1988, petitioner was convicted in the United States District Court for the Eastern District of Pennsylvania of conspiracy to import Phenyl-2-Propanone (P2P), in violation of 21 U.S.C. 963; importation of P2P, in violation of 21 U.S.C. 952(a); and attempt to import P2P, in violation of 21 U.S.C. 963. He was sentenced to five years' imprisonment on the conspiracy count and five years' imprisonment on the importation count followed by ten years' special parole, with the two sentences to run consecutively. Imposition of a prison sentence on the third count was suspended and petitioner was sentenced to probation for five years, with that probation sentence to commence at the expiration of the sentences imposed under the other two counts. Pet. App. 25a-26a; *United States* v. *DeRewal*, 10 F.3d 100, 102 (3d Cir. 1993), cert. denied, 114 S. Ct. 1544 (1994). The offense for which petitioner received probation was committed before November 1, 1987. Gov't C.A. Br. 22 n.7. Therefore, the probation was imposed under the Federal Probation Act (FPA), 18 U.S.C. 3651, which was repealed by the Comprehensive Crime Control Act of

1986, Pub. L. No. 98-473, §§ 212(a)(1) and (2), 235(a)(1), 98 Stat. 1987, 2031, as amended by Pub. L. No. 99-217, § 4, 99 Stat. 1728, effective date November 1, 1987, and replaced by 18 U.S.C. 3561, 3566.

On December 17, 1992, petitioner was granted parole from his ten-year imprisonment term, with his parole scheduled to expire at the end of the ten years, *i.e.*, on October 18, 1998. Petitioner's ten-year special parole term would then commence. After completion of special parole, petitioner's five-year term of probation would begin. Pet. App. 4a-5a.

2. While petitioner was serving the regular parole on his initial imprisonment term, the United States Probation Department charged petitioner on September 7, 1994, with having violated the conditions of his probation because he had not responded truthfully to inquiries by his probation officer, had not followed the officer's instructions, had associated with persons known to be engaged in criminal activity or known to have been convicted of a felony, and had violated the law. Pet. App. 5a; Pet. 14. The charges were, in part, based on the discovery of petitioner, during the execution of a search warrant by the Federal Bureau of Investigation and the Drug Enforcement Administration at petitioner's residence, in the company of a person he knew to be a convicted felon. Pet. App. 16a. The charges were also based on information obtained from one of petitioner's neighbors who overheard petitioner's telephone conversations as a result of an illegal splice petitioner had made into her telephone line. *Id.* at 5a, 17a. The conversations included statements by petitioner instructing a woman to cash in his "CD's" held in other people's names in Costa Rica and not to use U.S. Currency to avoid trouble. *Id.* at 19a. Petitioner had been fined $30,000 as part of his

sentence, but, when he was released, petitioner swore that he had no property exceeding twenty dollars and had told his probation officer that he had no assets. *Ibid.*

Petitioner claimed that the court lacked jurisdiction to revoke his probation because his term of probation had not yet commenced. He relied on a Fifth Circuit opinion, *United States* v. *Wright*, 744 F.2d 1127 (1955), which had interpreted the opinion in *Affronti* v. *United States*, 350 U.S. 79 (1955), as prohibiting an overlap between probation provisions and the parole or executive clemency powers of the Executive Branch. Pet. App. 22a-23a. The district court disagreed. It concluded that the Third Circuit, in *United States* v. *Camarata*, 828 F.2d 974 (1987), cert. denied, 484 U.S. 1069 (1988), had explained that *Affronti* did not deal with the situation presented here where the court is revoking probation instead of granting it. Pet. App. 23a-24.

At the hearing on revocation of probation, petitioner moved for disclosure of his entire probation file. The court denied that motion. Pet. App. 5a. Petitioner also contended that the conditions of his probation had been modified previously without the procedural rights provided by Federal Rule of Criminal Procedure 32.1. The court rejected the contention, concluding that the alteration in the description of the conditions to which petitioner pointed merely clarified the conditions and did not make a substantive change. Pet. App. 19a-20a.

The government's evidence at the hearing focused on testimony by petitioner's neighbor about the telephone calls, and also included testimony by telephone employees, petitioner's probation officer, and FBI agents. Pet. App. 5a. After the hearing, the court

concluded that petitioner had violated his probation because he had been untruthful to his probation officer about travel plans and financial assets he owned, and had violated 18 U.S.C. 1001 by making false statements about his financial assets to the officer and in an oath he took upon his release from prison. Pet. App. 20a. The court also found that the evidence established that petitioner had been associating with a person he knew to be a convicted felon in violation of his probation conditions. *Ibid.* Finally, the court concluded that petitioner engaged in criminal conduct in violation of his probation conditions when he arranged for a telephone to be illegally connected to his residence. *Ibid.* The court revoked petitioner's probation and sentenced him to 36 months' imprisonment. *Id.* at 5a.

3. The court of appeals affirmed. Pet. App. 1a-12a. The court rejected petitioner's contention that the district court did not have the authority to revoke his probation because he had not yet started serving that probation sentence and was still serving the parole granted him by the Executive Branch. *Id.* at 6a-10a. The court concluded that "such judicial action regarding probation does not disturb the executive branch's authority to control [petitioner's] parole." *Id.* at 4a. The court relied on *United States* v. *Williams*, 15 F.3d 1356 (6th Cir.), cert. denied, 115 S.Ct. 431 (1994), in which the court held that "a district court does have authority to revoke probation for pre-probation conduct, including the pre-probation conduct of a paroled convict." Pet. App. 6a, quoting *Williams*, 15 F.3d at 1357. The court agreed with *Williams* that 18 U.S.C. 3651 authorized the revocation. Pet. App. 6a.

The court also agreed with *Williams* that allowing a court to revoke probation for pre-probation conduct would not unduly interfere with Executive Branch administration of a convict's custodial sentence or violate the separation of powers. The court, as did *Williams*, distinguished *Affronti* v. *United States*, *supra*, in which this Court held that once a defendant begins to serve the first in a series of consecutive custodial sentences, a court may not change a subsequent custodial sentence to a probation sentence. Pet. App. 6a-10. The *Affronti* Court had reasoned that "the probationary power ceases with respect to all of the sentences composing a single cumulative sentence immediately upon imprisonment for any part of the cumulative sentence." *Id.* at 6a, quoting *Affronti*, 350 U.S. at 83. The *Affronti* Court had concluded that, otherwise, a change from a sentence of imprisonment to a sentence of probation would interfere with the Executive's parole and clemency power. Pet. App. 7a, quoting *Williams*, 15 F.3d at 1362. The *Williams* court explained, however, that the *Affronti* reasoning does not apply in the reverse situation, *i.e.*, where a probationary sentence is changed into a custodial sentence. The court pointed out that "[t]he possibility that a probationary sentence would be converted into a custodial sentence is inherent in the very notion of probation. Furthermore, the conversion * * * still leaves the executive free to administer the converted sentence." Pet. App. 7a, quoting *Williams*, 15 F.3d at 1363-1364.

The court of appeals acknowledged, as did the court in *Williams*, that petitioner's position had been accepted by the Fifth Circuit in *United States* v. *Wright*, *supra*. Pet. App. 8a. The court noted that the Third Circuit already had expressed criticism of

the *Wright* case, however, in its own earlier opinion in which it had expressly reserved ruling on the issue now presented. Pet. App. 3a, 9a, citing *United States* v. *Camarata*, *supra*. Reaching the issue reserved in *Camarata*, the court of appeals concluded that "*Affronti* was misapplied in *United States* v. *Wright* and should not be read to prohibit the district court from revoking probation based on pre-probationary conduct." Pet. App. 9a-10a.

The court also rejected petitioner's argument that the conditions of his probation had been modified in violation of Federal Rule of Criminal Procedure 32.1(b).[1] Petitioner noted that the language in his judgment and commitment order regarding his obligations to associate "only with law-abiding persons" and "follow the probation officer's instructions" differed from the language in the form he signed for his probation officer that directed him not to associate "with any persons engaged in criminal activity" or "with any persons convicted of a felony unless granted permission to do so by the probation officer." Pet. App. 10a. The court found, however, that the differences in wording were "insignificant" and concluded that "[a]ny violation of the second version would certainly have contravened the first version as well." *Ibid.* It agreed with the district court that the language had merely been clarified and that the conditions had not been substantively changed. *Id.* at 10a-11a.

Turning to petitioner's argument that he was entitled to complete disclosure of his probation file, the

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[1] Rule 32.1 sets forth the procedures for revocation and modification of probation or supervised release which include provision of a hearing and counsel.

court noted that Federal Rule of Criminal Procedure 32.1(a)(2)(B) provides that a defendant is entitled to disclosure of the evidence against him at a probation revocation hearing. Pet. App. 11a. The court reasoned, however, that the rule cannot reasonably be read to require automatic production of a probation officer's entire file even if the officer is a witness. *Ibid.* The court concluded that the district court had not erred because petitioner had been provided with relevant documents from the file and the district court had protected petitioner's rights further by examining the rest of the file in camera. *Ibid.* The court also rejected petitioner's challenge to the sufficiency of the evidence against him. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 17-23) that the district court lacked jurisdiction to revoke his federal probation for misconduct committed while he was on parole. The court of appeals correctly resolved that question.

a. Section 3651 provided: "[t]he court may revoke or modify any condition of probation, or may change the period of probation." 18 U.S.C. 3651 (1982). The court of appeals correctly held that the district court had authority to revoke petitioner's probation for a pre-probation offense under former 18 U.S.C. 3651. That result is consistent with the statutory text as well as the purposes of the statute. The probation statute "was designed to provide a period of grace in order to aid in the rehabilitation of a penitent offender." *Burns* v. *United States*, 287 U.S. 216, 220 (1932). The provisions of the statute were adapted to the end of "individualiz[ing] each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which would

be possible only in the exercise of a broad discretion." *Ibid.* This Court has recognized that, "[t]o accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential." *Ibid.* Foreclosing the courts from revoking probation based on a pre-probation offense would provide the defendant with a grace period in which his misconduct could not affect his probationary release into society. That result would be at odds with the congressional goal of flexibility and the principle that probation is designed to give offenders an opportunity to demonstrate that they do not pose a risk of recidivism.

Petitioner's reliance (Pet. 17-18) on *United States* v. *Murray*, 275 U.S. 347 (1928), and *Affronti* v. *United States*, 350 U.S. 79 (1955), is misplaced. In *Murray*, the Court held that district courts lacked authority to suspend a sentence and grant probation after service of the sentence had begun. 275 U.S. at 356-359. In *Affronti*, the Court extended *Murray* to hold that district courts had no power to suspend any of a series of consecutive sentences and grant probation after the defendant had begun to serve the first of the consecutive sentences. 350 U.S. at 83-84. In both cases, the Court stated that the probation statute should be construed to "avoid interference with the parole and clemency powers vested in the Executive Branch." 350 U.S. at 83; see also 275 U.S. at 357. Both *Murray* and *Affronti* limited the ability of the lower courts to mitigate sentences once the defendant became subject to the Executive's parole and clemency powers.

The rationale underlying *Murray* and *Affronti* does not apply to petitioner's case. *Murray* and *Affronti* addressed only the concerns underlying a grant of probation—the release of an incarcerated

prisoner already in the custody and under the supervision of the Bureau of Prisons. The *Affronti* Court stressed that it was "concerned with the power to grant suspension of sentences," 350 U.S. at 81, not the power to revoke probation. And the *Murray* Court examined only "whether there [was] any power in the federal courts * * * to grant probation under the Probation Act, after the defendant ha[d] served any part of his sentence." 275 U.S. at 352.

In *Murray* and *Affronti*, the Court did not address the very different situation presented by the revocation of probation, which results in the incarceration of a person not then in custody. The revocation of probation does not result in any conflict with the Executive's parole and clemency authority. Unlike a grant of probation, a revocation of probation does not free the defendant at a time that the parole and prison officials may consider inappropriate. Rather, it results in a term of incarceration that the parole authorities may then adjust.

Petitioner seeks to distinguish (Pet. 19, 20-23) *United States* v. *Williams*, *supra*, on the ground that the petitioner in that case had completed parole and his probation was revoked while he was in his probationary period. The critical aspect of *Williams*, however, is that the misconduct for which probation was revoked occurred while the petitioner in *Williams* was on parole. The holding in *Williams* that revocation for that misconduct was permissible establishes that parole authorities do not have the exclusive authority to consider how a convict behaves while on parole. The sentencing court may also, under *Williams*, take account of misconduct committed while the convict was on parole. If petitioner were correct that *Williams* turned only on the timing

of the revocation itself, the district court could revoke probation based on misconduct committed while the defendant was on parole, but the court would have to await the first day of the probationary period to issue its revocation order. Neither *Williams* nor the probation statute, however, requires that result.

b. Petitioner is correct (Pet. 17, 19) that the holding in this case and *Williams* conflicts with the Fifth Circuit's decision in *United States* v. *Wright*, 744 F.2d 1127 (1984). As the courts of appeals here and in *Williams* correctly reasoned, however, *Wright* misinterpreted *Affronti*. As explained above, the concerns expressed in *Affronti* were triggered by the grant of probation to a convict on parole (*i.e.*, the release of a convict that the parole authorities believed should be confined), not the confinement of a convict, whom the parole authorities then may determine should be released again on parole or retained in confinement.[2]

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[2] The other cases petitioner claims to be in conflict with the court of appeals' decision in the instant case (Pet. 20) do not in fact present any conflict. All the cases hold that the district court has authority to revoke probation. See *United States* v. *King*, 990 F.2d 190 (5th Cir.) (authority to revoke probation based on conduct committed while on current parole and probation), cert. denied, 114 S. Ct. 223 (1993); *United States* v. *Fryar*, 920 F.2d 252 (5th Cir. 1990) (authority to revoke probation based on conduct committed after sentencing and before the start of probation), cert. denied, 449 U.S. 981 (1991); *United States* v. *Johnson*, 892 F.2d 369 (4th Cir. 1989) (authority to revoke probation based on conduct committed after sentencing and before the start of probation); *United States* v. *James*, 848 F.2d 160 (11th Cir. 1988) (authority to revoke probation based on conduct committed after conviction but before sentencing); *United States* v. *Daly*, 839 F.2d 598 (9th Cir. 1988) (authority to revoke probation based on conduct committed after sentenc-

Review by this Court is not warranted, however, because the statute that governs petitioner's case, the Federal Probation Act, 18 U.S.C. 3651-3656, was repealed by Congress when it enacted the Comprehensive Crime Control Act of 1984. See Comprehensive Crime Control Act of 1986, Pub. L. No. 98-473, §§ 212(a)(1) and (2), 235(a)(1), 98 Stat. 1987, 1995, 2031, as amended by Pub. L. No. 99-217, § 4, 99 Stat. 1728, codified in 18 U.S.C. 3565(a)(2). Section 3565 of the new statute states that "[i]f the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may * * * revoke the sentence of probation * * *." That provision clearly permits revocation of probation for acts committed before the commencement of the probationary term. See *United States* v. *Yancey*, 827 F.2d 83, 87-88 (7th Cir. 1987), cert. denied, 485 U.S. 967 (1988); *United States* v. *Veatch*, 792 F.2d 48, 51 (3d Cir.), cert. denied, 479 U.S. 933 (1986). Accordingly, the issue presented by petitioner is of

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ing but before the start of probation); *United States* v. *Camarata*, 828 F.2d 974 (3d Cir. 1987) (authority to revoke probation based on conduct committed during incarceration before the start of probation), cert. denied, 484 U.S. 1069 (1988); *United States* v. *Davis*, 828 F.2d 968 (3d Cir. 1987) (same), cert. denied, 484 U.S. 1069 (1988); *United States* v. *Yancey*, 827 F.2d 83 (7th Cir. 1987) (authority to revoke probation based on conduct committed after sentencing and before the start of probation), cert. denied, 485 U.S. 967 (1988); *United States* v. *Veatch*, 792 F.2d 48 (3d Cir.) (authority to revoke probation based on conduct committed after sentencing and before incarceration or the start of probation), cert. denied, 479 U.S. 933 (1986); *United States* v. *Ross*, 503 F.2d 940 (5th Cir. 1974) (authority to revoke probation based on conduct committed after sentencing and before incarceration or the start of probation).

rapidly diminishing importance and does not merit further review.

2. Petitioner maintains (Pet. 23-25) that the denial of access to his full probation file violated Federal Rule of Criminal Procedure 26.2(a) and denied him due process. Rule 26.2 incorporates the requirements of the Jencks Act (18 U.S.C. 3500) that a defendant is entitled to see a witness's statement after he has testified for the government. That rule is made applicable to probation-revocation hearings by Fed. R. Crim. P. 32.1(c)(1). In addition, Rule 32.1(b)(2)(B) requires "disclosure of the evidence against the person" who is subject to the violation proceeding.

The court of appeals held that petitioner "was provided with relevant documents from the file and was further protected by the district court's in camera review." Pet. App. 11a. The court further ruled that "the district court did not err in refusing to order the production of the probation officer's entire file." *Ibid.* Petitioner claims (Pet. 24-25) that there were in fact statements of the probation officer in his file that should have been, but were not, disclosed under Rules 32.1 and 26.2. He claims (Pet. 24) that the district court did not fully examine the entire file for such statements. There is no basis in the record to support petitioner's factual claims. In any event, such a factual dispute does not warrant review by this Court.

3. Finally, petitioner argues (Pet. 26-28) that the differences in wording between the conditions of his probation specified in the judgment and commitment order and those specified in the administrative document he signed when he was released on parole constituted an administrative "modification" of the condi-

tions of his probation, without the hearing required by Federal Rule of Criminal Procedure 32.1(b).

The courts below correctly resolved the issue, concluding that the differences in wording were "insignificant" and that "[a]ny violation of the second version would certainly have contravened the first version as well." Pet. App. 10a. Since there was no "modification" of his conditions of probation, the procedural requirements of Rule 32.1 were not triggered. There is no warrant for this Court's review of the fact-based resolution of that contention by the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1996

(3)

Supreme Court, U. S.
FILED
MAR 25 1996
CLERK

No. 95-1144

In The

Supreme Court of the United States

October Term, 1995

MANFRED DeREWAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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2 pp

There are two incorrect factual assertions made by the United States in its Brief in Opposition to the Petition for Writ of Certiorari filed herein.

1. On page 3, it is asserted that Petitioner made an illegal splice onto a telephone line. That is incorrect. The condition which resulted in the telephone lines being crossed was in place prior to Petitioner's release from confinement, and there was no evidence he was responsible therefor.

2. It is alleged at pages 8 and 13 that the District Court reviewed the parole officer's file in camera. That is an overstatement of the facts. The Court limited its review to a single entry to determine whether a statement alleged to be made by Petitioner was in fact in the file. That was the extent of the review. As the statement was not contained in the file, counsel pursued the attempt to have the file produced for examination of the witness. It was not produced and no further review of the file was conducted by the District Court.